efficacious phrase from the opinion of the United States Supreme Court in *Kronprinzessin Cecille*,[30] that "business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs."

E. G. H.

INFORMAL WILLS OF SOLDIERS AND MARINERS*.—*Dulce et decorum est pro patria mori.*[1] This ancient proverb doubtless has been a source of comfort and satisfaction to countless hosts of soldiers for many centuries. Since it has been felt, however, that death for one's country cannot be a source of unalloyed pleasure to the deceased, soldiers of many nations [2] have ever been the objects of peculiar indulgence in a number of ways—perhaps in no other so notably as in the matter of making their wills. Two thousand years ago Julius Cæsar first freed his *milites* from the necessity of observing the strict forms of the Roman law of testaments.[3] And from early days the English and American people in their statutes have extended to the defenders of the nation on land and sea similar testamentary privileges with respect to their personal property.

Various reasons for the granting of this privilege have been suggested. In one of his military orders, the Emperor Trajan declared: "I have decided that the inexperience of my most excellent and faithful fellow-soldiers should be indulged so that, no matter how thy have executed their wills, their wishes should be respected." [4] It has been said to be a special immunity "for honourable service and perilous exertion" by the "gallant but unlettered and endangered soldier." [5] This is only one of many special favors extended to their soldiers and sailors by the Romans. They were moved, no doubt, not only by a sense of gratitude, but also by the fact that the average soldier or sailor was necessarily unskilled in the mysteries of the law and during his term of service was generally unable to obtain expert advice *(inops consilii)*[6].

[30] *Supra.*

*This note was prepared after a study of the learned and thorough opinion of Gest, J., in Henninger's Estate, 30 Pa. Dist. Ct. 413 (1921).

[1] Horace, Odes and Epodes, Bk. III, Ode II.

[2] Only the testamentary privileges granted by the Roman Law and the Common and Statute Laws will be considered here. For a list of the authorities of European countries under the Civil law, see Drummond v. Parish, 3 Curt. 522 (Eng. 1843).

[3] Hunter, Roman Law, 3 ed. p. 771 (1897); Drummond v. Parish, *supra.*

[4] See Henninger's Estate, 30 Pa. Dist. Ct. 413 (1921).

[5] Browne, Civil Law, 2 ed., p. 291 (1802).

[6] Ayliffe, Pandect of Roman Civil Law, Book III, Tit. XIV; In the Goods of Sarah Hale, Ir. R. 2 K. B. (1915) 362; Smith's Will, 6 Phila. 104 (Pa. 1865).

At early common law a valid written or oral (nuncupative)[7] will of chattels could be made by any male person at least fourteen years of age.[8] No special privilege was granted to any particular class since no strict testamentary form was required of any person.[9] Any words, written or oral, were sufficient, just as long as the act of writing or speaking and the testamentary intent of the deceased were clearly proved. Two witnesses were required for an oral will[10] and none for a written will.[11] It is uncertain whether at early common law it was necessary for the validity of a nuncupative will that it be made during the last illness in the face of death *(in extremis)*.[12] Subsequently this probably was not a requirement,[13] but as education[14] began to spread among the people, the great necessity for their toleration ceased, and it seems clear that they were so limited in actual practice.[15]

Loose nuncupative wills are necessarily a source of some danger. After one particularly flagrant attempt had been made to have such a will established by gross fraud and perjury,[16] the English legislature felt compelled to take action, and the Statute of Frauds[17] was passed. By this act nuncupative wills of personalty were still permitted, but only when hedged about with strict formalities; then

[7] "And a testament nuncupative is . . . when the testator lieth languishing for fear of sudden death, dareth not to stay the writing of his testament; and therefore he prayeth his curate, and others his neighbors, to bear witness of his last will, and declareth by word what his last will is": Perkins, Conveyancing, 14 ed., 209 (1757).

[8] Williams, Executors, 11 ed., Pt. 1, Bk. 2, c. 1, sec. 1 (1921); Deane v. Littlefield, 1 Pick. 239 (Mass. 1822); Smallwood v. Berthouse, 2 Show. 204 (34 Car. 2).

[9] Henninger's Estate, *supra*.

[10] Henninger's Estate, *supra*.

[11] Swinburne, Wills, 7 ed., Pt. 1, sec 10 (1793).

[12] Schouler, Wills, Executors and Administrators, 5 ed., Vol. 1, sec. 361 (1915).

[13] See Johnston *et al.* v. Glasscock, 2 Ala. 218 (1841), at p. 239, *et seq.*

[14] "This Kind of Testament [nuncupative] is commonly made when the Testator is very sick, weak, and past all Hope of Recovery. For it is received for an Opinion amongst the ruder and more ignorant People, that if a Man should be so wise as to make his Will in his Health, when he is strong and of good Memory, having Time and Leisure and might ask Counsel of the Learned, that then surely he should not live long after. And therefore, they defer it till such Time, when it were more convenient to apply themselves to the Disposing of their Souls, than of their Lands and Goods. And in Consideration hereof it is, that Testaments are so much favored which be made in such Times, namely, for that the Testator then cannot conveniently stay to ask Counsel of such Points as be doubtful in Law": Swinburne, Wills, *supra*, Pt. 1, sec. 12.

[15] Prince v. Hazelton, 20 Johns. 503, 511 (N. Y. 1822).

[16] Cole v. Mordaunt, 4 Ves. 196, note (1676).

[17] 29 Car. II c. 3, sec. 19-22.

came the Wills Act of I Victoria,[18] providing that all wills must be in writing and that every testator must be at least twenty-one years of age.[19] As we shall see, however, important reservations were made to apply to soldiers and sailors, both in the English and the Pennsylvania Wills Acts. All of our Pennsylvania statutes [20] on the subject permit nuncupative wills of personalty if executed with certain formalities.

The exemption in favor of soldiers and sailors in the Statute of Frauds is as follows:

"Sec. 23.—Provided always that, notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages,[21] and personal estate as he or they might have done before the making of this act."

The Act of I Victoria, and the Pennsylvania Wills Acts of 1705, 1833 and 1917 contain like provisions in almost identical words. A number of the other States have closely similar enactments.[22] The Wills (Soldiers and Sailors) Act [23] extends the privileges of members of the navy and the marines in England, and declares that members of the Air Force are included in the word "soldier." In addition it provides that a devise of real estate shall be "valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such person . . . it would have been valid." [24] This is an exceptionally generous provision. The other statutes exempted soldiers and mariners from restrictions which were being placed upon all other persons [25]—this statute creates for them, even though they be infants, the rare privilege of making a valid oral devise of real estate.[25a]

[18] (1837) C. 26.

[19] Sections 9 and 7.

[20] The Wills Act of 1705 (1 Sm. Laws 33); of 1833 (P. L. 249); and of 1917 (P. L. 403); the Act of March 15, 1832 (P. L. 135).

[21] In England there now are special acts providing for the disposition by His Majesty's seamen and marines of their wages and effects. They are not dealt with in this note. See Williams, Executors, 11 ed., Pt. 1, Bk. 4, c. 3 (1921).

[22] 1 Stimson, Am. Stat. Law, Sec. 2700.

[23] (1918) C. 58.

[24] Sec. 3. See In the Estate of Yates [1919] P. 93 (Eng.).

[25] It is pointed out by Gest, J., in Henninger's Estate, *supra*, that the English soldiers and mariners were permitted to *retain* a privilege, while the Roman soldiers had one *created* for them.

[25a] Though not yet construed by a court with respect to infants, it seems impossible of any other interpretation.

The courts almost universally have been liberal in their interpretation of the exempting sections of the various statutes. Attempts have been made to have these sections construed as referring only to the manner of executing a will and, therefore, as not exempting infant soldiers, and as not applying to revocations. The attempts have met with failure in the stronger cases.[26] The result is that the status of the modern soldier and mariner in most jurisdictions is almost identical with that of all persons before the passage of the Statute of Frauds; with respect to both manner of executing a will of personalty, and testamentary capacity.[27] Several restrictions, however, should be noted. They relate to revocation by subsequent marriage [28] and power to appoint a guardian.[29]

In the English statutes the exemption is in favor of "any soldier being in actual military service, or any mariner or seaman being at sea"; the Pennsylvania Acts make provision for "any mariner being at sea, or any soldier being in actual military service." [30] The enactments in most of the other states use closely similar language.[31] "Mariner" and "seaman" include not only members of the government's naval forces,[32] but also those of the merchant fleets.[33] Similarly, "soldier" is meant to apply to the military forces of the East India Company [34] as well as to the regular army.[35] The privilege belongs to all, irrespective of rank.[36] It also appears

[26] In the Estate of Gossage [1921] P. 194 (Eng.); Henninger's Estate, *supra*. *Contra:* a *dictum* in *In re* Wernher, L. R. 1 Ch. Div. (1918) 339; Goodell v. Pike, 40 Vt. 319 (1867). The fraud involved seems to have influenced the court strongly in the latter case. The Wills (Soldiers and Sailors) Act of 1918 definitely establishes the privilege of English infant soldiers and mariners.

[27] Henninger's Estate, *supra*.

[28] Sec. 18 of the Act of I Victoria, providing that a subsequent marriage shall revoke a will, has been held to apply to soldiers and mariners: In the Estate of Wardrop, [1917] P. 54 (Eng.).

[29] In the Estate of Tollemache [1917] P. 246 (Eng.). The Wills (Soldiers and Sailors) Act of 1918, sec. 4, has since changed the law.

[30] The language of the Act of 1705, *supra*, is slightly different, being "or any mariner *or person* being at sea" (Sec. 7).

[31] See 1 Stimson, Am. Stat. Law, *supra*.

[32] In the Goods of Hayes, 2 Curt. 338 (Eng. 1839).

[33] In the Goods of Paterson, 79 L. T. R. 123 (1898); *Ex parte* Thompson, 4 Bradf. 154 (N. Y. 1856); Hubbard v. Hubbard, 8 N. Y. 196 (1853).

[34] *Gunner:* In the Goods of Prendergast, 5 N. of Cas. 92 (Eng. 1846). *Surgeon:* In the Goods of Donaldson, 2 Curt. 386 (1840).

[35] *In re* Stable [1919] P. 7 (Eng.); Leathers v. Greenacre, 53 Me. 561 (1866); Van Deuzer v. Gordon, 39 Vt. 111 (1866); Botsford v. Krake, 1 Abb. P. R. (N. S.) 112 (N. Y. 1866); Anderson v. Pryor, 10 Smed. & M. 620 (Miss. 1848).

[36] *Mariner:* In the Goods of M'Murdo, L. R. 1865, P. & D. 540. *Cook: Ex parte* Thompson, *supra*. *Master:* In the Goods of Paterson, *supra*. *Female typist* on the *Lusitania:* In the Goods of Sarah Hale, *supra*. *Purser:*

that one is none the less a mariner or seaman or soldier because she happens to be a woman.[37] Nor is it necessary that the deceased had attained his majority; it is sufficient if he was at least fourteen years of age.[38] It is evident that this testamentary privilege is today not dependent upon lack of sufficient education to execute a formal instrument.[39]

The rule is for able-bodied, as well as for wounded and dying soldiers [40]—indeed, in the great majority of the cases the soldier was not even in the midst of immediate peril when he expressed his testamentary wishes.[41] The problem with which the courts have had the greatest difficulty is to determine just when one may be said to be "in actual military service" or "at sea." The answer has been clear when the soldier was actually on the field of battle,[42] or engaged in active operations [43] or in winter quarters [44] or in a hospital in the war area.[45] On the other hand, while in barracks at home [46]

In the goods of Hayes, *supra.* *Surgeon:* In the goods of Saunders, L. R. 1865, P. & D. 15. *Naval Lieutenant:* In the Estate of Yates, *supra.* *Admiral:* In the Goods of Austen, 2 Rob. Ecc. 611 (1853). *Private: In re* Stable, *supra;* Leathers v. Greenacre, *supra.* *Cornet:* In the Goods of Farquhar, 4 N. of Cas. 651 (Eng. 1846). *Captain:* In the Goods of Godley, 41 Ir. L. T. 160 (1907). *Major General:* In the Goods of Churchill, 4 N. of Cas. 47 (Eng. 1845). *Nurse:* In the Estate of Ada Stanley, [1916] P. 192 (Eng.). "As, in the army, the term 'soldier' embraces every grade, from the private to the highest officer . . . so in the marine, the term 'mariner' applies to every person in the naval or mercantile service. . . ." *Ex parte* Thompson, *supra.*

[37] In the Estate of Ada Stanley, *supra;* In the Goods of Sarah Hale, *supra.*

[38] Henninger's Estate, *supra; In re* Stable,, *supra;* In the Goods of Hiscock, [1901] P. 78 (Eng.); In the Goods of M'Murdo, *supra;* In the Goods of Farquhar, *supra.* For the cases *contra,* see note 26.

[39] In the Goods of May, 86 L. T. R. 120 (1901).

[40] Van Deuzer v. Gordon, *supra.* There is a *dictum* in the case of Ray v. Wiley, 11 Okl. 720 (1902), to the effect that the will must be made while the testator is *in extremis* or in actual fear, contemplation or peril of death.

[41] See, among others, In the Estate of Yates, *supra,* and *In re* Stable, *supra.*

[42] Henninger's Estate, *supra;* In the Goods of Churchill, *supra.*

[43] In the Estate of Gossage, [1921] P. 194 (Eng.); *In re* Limond, L. R. 2 C. D. (1915) 240; Van Deuzer v. Gordon, *supra;* Botsford v. Krake, *supra;* Anderson v. Pryor, *supra.*

[44] Leathers v. Greenacre, *supra.*

[45] Gould v. Safford's Estate, 39 Vt. 498 (1866). A letter written by a soldier in a German prison camp was held not entitled to probate only because the gifts of personal estate were dependent upon those of real estate: Godman v. Godman, W. N. (1919) 176 (affirmed in [1920] P. 193). This case was decided under the Act of 1 Victoria.

[46] Drummond v. Parish, *supra.* The privilege of making informal wills was granted by Julius Caesar first to *all* the Roman soldiers, and later to sailors; but it was gradually restricted until finally only those *expeditionibus occupati* were thus privileged.

or abroad[47] he is not "in actual military service," nor, *a fortiori,* is one who is at home on a furlough and not under orders to report shortly,[48] nor one who is about to leave home to become a volunteer.[49] One who is under orders to join a force about to enter into active operations, must take some "step" [50] toward obeying the orders before he can become a privileged soldier—just how great a step is by no means clear.[51] It seems imperative that a war be either in progress [52] or threatened.[53]

In construing the phrase, "at sea," extreme liberality has been shown.[54] Wherever the tide ebbs and flows is said to be a part of the sea;[55] and a mariner is at sea while on a voyage though his ship is at anchor in a harbor,[56] or while it is lying close to shore awaiting a fair wind [57] or is in port making preparation to sail.[58] Perhaps the greatest indulgence has been shown where the testamentary privilege of those "at sea" was granted to mariners during furloughs on shore.[59]

[47] In the Goods of Hill, 1 Rob. Ecc. 276 (Eng. 1845); White v. Repton, 3 Curt. 819 (Eng. 1844). See also In the Goods of Phipps, 2 Curt. 368 (Eng. 1840).

[48] Smith's Will, *supra.* "It ['actual military service'] . . . never can apply to the soldier who is in regular quarters or at his customary home on leave of absence" (p. 107). But see Herbert v. Herbert, Dea & Sw. 10 (1855).

[49] Pierce v. Pierce, 46 Ind. 86 (1874).

[50] This is the test laid down in In the Goods of Hiscock, *supra.* The court in Gattward v. Knee, [1902], P. 99 (Eng.) believes mobilization must have begun. ". . . the commencement of the military service is the time when the mobilization takes place. In the same way it seems to me that the actual military service does not cease until the full conclusion of the operations": *In re* Limond, *supra,* at p. 246.

[51] Compare *In re* Stable, *supra,* and In the Goods of Gordon, 21 T. L. R. 653 (1905), with In the Goods of Anderson [1916] P. 49 (Eng.).

[52] In the Goods of Hiscock, *supra.*

[53] Though the statutes do not so limit the privilege, it seems significant that apparently no soldiers' wills have been offered for probate except where such was the state of affairs.

[54] "The courts in England have gone to the uttermost verge of construction in extending this exception in behalf of seamen": Hubbard v. Hubbard, 8 N. Y. 196, 200 (1853). The Wills (Soldiers and Sailors) Act of 1918 attempts to clarify the meaning of the phrase.

[55] Hubbard v. Hubbard, *supra.* On the high seas; Morrell v. Morrell, 1 Hagg. Ecc. 51 (1827). On a Chinese river: In the Goods of Austen, *supra.* A mariner on a gunboat on the Mississippi River during an attack upon Vicksburg was not "at sea": The Will of Gwin, Tuck. 44 (N. Y. 1865).

[56] In the Goods of Thompson, 5 Notes of Cas. 596 (1847).

[57] *In re* Milligan, 2 Rob. Ecc. 108 (Eng. 1849).

[58] In the Goods of Paterson, *supra; Ex parte* Thompson, *supra.* But see In the Goods of M'Murdo, *supra.*

[59] On shore leave: In the Goods of Lay, 2 Curt. 375 (Eng. 1840). On furlough but under orders to report shortly: In the Goods of Sarah Hale,

Before even a soldier's or a mariner's will may be admitted to probate, the testamentary act and intent must, of course, be satisfactorily proved. The deceased, however, need only have intended to express his wishes in reference to the disposition of his property after death.[60] It is of no consequence that he declared his intention to draw a will subsequently.[61] The medium of the oral or written expression is immaterial.[62] As is obvious from the admission of letters to probate, the writing need not be attested.

In an hour when the cry is being raised that the nation is forgetful of its soldiers and sailors and unappreciative of their services, it is of interest to note the peculiar indulgence with which the law has treated them for centuries with respect to one of the most sacred of human rights. The privilege which Julius Cæsar created for his Legions twenty centuries ago is ours today.

C. Z. G., Jr.

IMPLIED WARRANTY OF QUALITY IN SALES OF FOOD.—"No man can justify selling corrupt victual, but an action on the case lies against the seller, whether the victual was warranted to be good or not." [1] This statement by Frowicke was relied upon by Blackstone as authority for the rule that "in contracts for provisions it is

supra. But in In the Estate of Thomas, In the Estate of Bowly, 62 Sol. J. 784 (1918), the court took a strict attitude, refusing to allow to probate the informal wills of two naval officers who were, respectively, lying wounded in a hospital and on furlough in London in order to be married. The decision of the Hale case was criticized. It was pointed out that Bowly's furlough was "not in the course of any voyage" and "no portion of his duties of the sea" (p. 784). Valid will of a wounded naval officer returning on a merchant ship from active service: In the Goods of Saunders, *supra.* But a captain of a merchant ship is not "at sea" while a passenger on another merchant ship; the mariner must be employed as such at sea: Warren v. Harding, 2 R. I. 133 (1852).

[60] Rice v. Freeland, 109 S. E. 186 (Va. 1921); *In re* Stable, *supra.*

[61] Gattward v. Knee (1902) P. 99 (Eng.); In the Goods of May, 86 L. T. R. 120 (1901). He need not have intended the letter to constitute a will: Rice v. Freeland, *supra.* But see the criticism of this case in the Virginia Law Review (February, 1922), p. 310.

[62] *Oral wills:* Henninger's Estate, *supra; In re* Stable, *supra; Ex parte* Thompson, *supra. Unattested written wills:* In the Goods of Lay, *supra. Attested by one person:* In the Goods of Farquhar, *supra. Letters:* Rice v. Freeland, *supra;* In the Estate of Ada Stanley, *supra;* Leathers v. Greenacre, *supra. Memorandum made at deceased's direction:* Gould v. Safford's Estate, *supra. Entries in abstract book:* In the Goods of Thompson, 5 Notes of Cas. 596 (1847). *Declaration made in compliance with military orders:* In the Goods of Scott, [1903] P. 243 (Eng.) *Interrogatory:* Hubbard v. Hubbard, *supra.* In one case there was admitted to probate a paper not written in the deceased's hand, without any signature (simply a mark not stated to be that of the deceased) and with no available witesses to prove its validity: In the Goods of Prendergast, 5 Notes of Cas. 92 (Eng. 1846).

[1] Keilway. 91.